

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

March 24, 2011

In the Matter of PHIPPS, Minors.

No. 300175

Lake Circuit Court

Family Division

LC No. 10-001383-NA

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Before: GLEICHER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

In this consolidated appeal, respondents J. Phipps and J. Nash appeal as of right from the trial court's order that terminated their parental rights to their minor children, A. Phipps and H. Phipps. The trial court terminated both Phipps's and Nash's parental rights under MCL 712A.19b(3)(j).¹ The trial court also terminated Phipps's parental rights under MCL 712A.19b(3)(i).² We affirm.

I. FACTS

¹ MCL 712A.19b(3)(j) (stating that the trial court may terminate a parent's rights to a child if the court finds, by clear and convincing evidence, that there is a reasonable likelihood of harm if the child is returned to parent).

² MCL 712A.19b(3)(i) (stating that the trial court may terminate a parent's rights to a child if the court finds, by clear and convincing evidence, that the parent's rights to a sibling of the child were previously terminated due to serious and chronic neglect or physical or sexual abuse and previous attempts to rehabilitate the parent failed).

The children were brought to the attention of the Department of Human Services (DHS) after Phipps attempted suicide in February 2010 by trying to hang himself while the children were in the home. Phipps admitted that he became extremely intoxicated and was upset over the fact that Nash was going to leave him. At the time, Nash was at a friend's house. And although she immediately returned to the home when she learned of the incident, only days later Nash again left the children alone in Phipps's care. The referral also alleged drug use by Phipps and Nash.

Phipps and Nash had a long history of neglect even before meeting one another. Nash was substantiated for neglect in 2004 with regard to an older daughter from a previous relationship. At the time, Nash was struggling with substance abuse, homelessness, and criminality. She also had a long history of mental health issues. The foster care worker assigned to that case testified that, during the two years that the older daughter was in care, Nash continued to struggle with homelessness and also obtained two new criminal charges against her. Nash received parenting classes and substance abuse counseling, and with support, Nash was able to succeed for a short period of time. However, something would inevitably trigger a relapse. Although Nash's parental rights to her older daughter were not terminated, the case was closed only after the child was placed with her biological father. According to the foster care worker, at the close of that case, Nash was "almost where we started out." That case was closed in August 2005. Nash was already pregnant with A. Phipps at the time. For his part, Phipps admitted that he lost his parental rights to two of his older children while he was living in Florida.

Not only did Phipps and Nash have their own separate histories of Children's Protective Services (CPS) intervention, they also had issues as a couple. CPS received numerous referrals about the family beginning in 2006. The allegations often included domestic abuse and drug use. A case was substantiated and services were put into place. Phipps and Nash were offered a number of services, including psychological evaluations, counseling, and substance abuse treatment. The family also received in-home services and financial assistance. Eventually, Phipps and Nash progressed enough to have the children returned to their care. Nash even underwent an intensive substance abuse program at the time.

After initiation of the present termination proceedings, DHS offered Phipps and Nash numerous services, including mobile drug screening. Yet Phipps and Nash missed more screens than they took. Lake County CPS worker Carey Adrianse testified that neither parent was cooperative with drug testing, as they were "very hard to track down." They always had excuses for why they were unavailable. Phipps claimed that he was incapable of providing a sample within 15 minutes because of possible kidney stones, and he claimed that they could not be home when the screener came because they had "other stuff to take care of," although both were unemployed. Phipps tested positive for cocaine in February 2010, and Nash tested positive for marijuana on that same day. A Families First worker testified that during a family fun night in March 2010, Nash was "nodding off and incoherent . . . and had to be reminded to chew her food." Phipps and Nash had some negative screens, but Phipps tested positive for cocaine and amphetamines while the termination proceedings were pending. Notably, Nash refused to submit to a test on the day of one of the termination hearings.

Adrianse testified that Nash also received mental health services. Phipps was also offered a psychological evaluation and a substance abuse assessment, neither of which he

attended initially. And while Phipps did ultimately complete his substance abuse assessment, he never did fully complete the psychological evaluation.

Adrianse believed that Phipps and Nash were living together. And although Nash had applied for SSI benefits, she was not in a position to provide for herself—she had no current source of income. Nash also spent time in and out of jail for failure to pay child support. At some point, Phipps evicted Nash, at which time Nash alleged that Phipps was verbally and physically abusive. Nash went to live in a shelter, but she was asked to leave after being caught with alcohol and prescription drugs.

Adrianse believed that termination was appropriate because Phipps and Nash both had a “repeated pattern of chronic abuse[,]” which caused them to be “neglectful to their children.” Adrianse testified that their past psychological evaluations indicated that their substance abuse took first priority. Adrianse was also concerned that there were often strangers in the home who claimed to be authorized to take care of the children while the father was out of state and the mother was nowhere to be found. Although Adrianse testified that the children appeared to be more bonded to Nash than Phipps, when the children were removed, there was no crying and the children did not express much emotion.

Families First worker Ted Lascari testified that Families First, DHS, and Phipps and Nash had a meeting in March 2010, at which time Phipps admitted that he did not follow the recommendations because he did not believe that DHS was helping him. It was agreed that Nash would return to the home, and she agreed to continue to work with Families First. Phipps agreed to complete a psychological evaluation and a substance abuse assessment as well as submit drug screens. Nash completed the Families First program, but did not reach her goals. Phipps only completed a little more than half of the program.

Nash testified that she left the children alone with Phipps after his suicide attempt because she felt that Phipps was capable of taking care of them. She pointed out that when CPS came to the home the Monday after the suicide attempt, they also left the children in the father’s care. She also claimed that even though she was asked to leave the shelter, she was planning on leaving that same day anyway. She denied having alcohol and denied knowing about the prescription drugs in her bag. When asked about the family fun night, Nash admitted that she had difficulty functioning, but that was because she took her prescription medication.

The trial court found clear and convincing evidence to terminate both Phipps’s and Nash’s parental rights pursuant to MCL 712A.19b(3)(j). It also found an additional ground to terminate Phipps’s parental rights pursuant to MCL 712A.19b(3)(i). Phipps and Nash now appeal as of right.

II. TERMINATION OF PHIPPS’S AND NASH’S PARENTAL RIGHTS

A. STANDARD OF REVIEW

To terminate parental rights, the trial court must find that the DHS has proven at least one of the statutory grounds for termination by clear and convincing evidence.³ We review for clear error a trial court's decision terminating parental rights.⁴ A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made.⁵ We give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.⁶

B. STATUTORY GROUNDS FOR TERMINATION

The trial court did not clearly err in finding that the statutory grounds for termination of Phipps's and Nash's parental rights were established by clear and convincing evidence.

Phipps and Nash had a long history of neglect both before meeting one another and while together. While they were together, there were multiple referrals about the family beginning in 2006. The allegations often included domestic abuse and drug use. And although Phipps and Nash progressed enough to have the children returned to their care, the children were again brought to DHS attention after Phipps's suicide attempt. And despite his unstable actions, Nash saw no problem with leaving the children alone with Phipps only days later. The referral also included allegations of substance abuse, which were later substantiated by drug screens. Numerous screens were unable to be taken during the progression of the case due to the refusal of Phipps and Nash to cooperate with the testing. Notably, however, Phipps was tested and came up positive for cocaine and amphetamines while the termination proceedings were pending, and Nash refused to submit to a test on the day of one of the termination hearings.

It is clear that Phipps and Nash continued an ongoing struggle with substance abuse, which, as one care worker testified, was a priority in their lives. Phipps was uncooperative with the programs, and Nash's testimony demonstrated that she was unwilling to take responsibility for her conduct. The record provided clear and convincing evidence that placement with Phipps and Nash would have put the children at risk of harm and that Phipps and Nash were not likely to change in the near future.⁷

Although the trial court need only find that the DHS has proven one of the statutory grounds for termination by clear and convincing evidence,⁸ the record also supported the trial

³ MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

⁴ MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Sours Minors*, 459 Mich at 633.

⁵ *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

⁶ MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

⁷ MCL 712A.19b(3)(j).

⁸ MCL 712A.19b(3); *In re Sours Minors*, 459 Mich at 632.

court's finding that termination of Phipps's rights was appropriate under MCL 712A.19b(3)(i) because Phipps lost his parental rights to two of his older children while he was living in Florida.

C. GUARDIANSHIP

Phipps and Nash also argue that the trial court erred in terminating their parental rights without first assessing whether a guardianship was feasible. However, the trial court had already determined that clear and convincing evidence existed to terminate Phipps's and Nash's parental rights. The possibility of a guardianship did not affect whether statutory grounds for termination existed.

At no time did Phipps and Nash offer any evidence to support the possibility of a guardianship. Additionally, a guardianship would not have provided the children with permanence or stability; rather, the children would have undoubtedly been subjected to their parents' continued instability, drug use, and criminality. The same evidence that supported the statutory grounds supported a finding that termination of Phipps's and Nash's parental rights was in the children's best interests. The trial court did not err in failing to consider a guardianship in lieu of termination.

III. BEST INTERESTS DETERMINATION

A. STANDARD OF REVIEW

Once DHS has established a statutory ground for termination by clear and convincing evidence, if the trial court also finds from evidence on the whole record that termination is clearly in the child's best interests, then the trial court shall order termination of parental rights.⁹ There is no specific burden on either party to present evidence of the children's best interests; rather, the trial court should weigh all evidence available.¹⁰ We review the trial court's decision regarding the child's best interests for clear error.¹¹

B. ANALYSIS

Phipps and Nash contend that the trial court erred in its best interests analysis because the trial court failed to specifically state in its bench opinion that termination of their parental rights was in the children's best interests.

⁹ MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich at 351. We note that MCL 712A.19b(5) was recently amended such that the trial court must now find that termination of parental rights *is* in the child's best interests, 2008 PA 199, effective July 11, 2008, rather than finding that termination is *not* in the child's best interests.

¹⁰ *In re Trejo Minors*, 462 Mich at 353.

¹¹ *Id.* at 356-357.

MCL 712A.19b(5) requires a trial court to find *both* that there is a statutory basis for termination and that termination is in the children's best interests. And, under MCL 712A.19b(1), a trial court is obligated to "state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be terminated."

Although the trial court did not make a best interests determination from the bench, the written order terminating parental rights indicates the trial court's finding that termination was in the children's best interests. Moreover, even absent the trial court's specific finding that termination of the parental rights of Phipps and Nash was in the children's best interests, reversal is not required where the record clearly and convincingly shows that termination was in the children's best interests.¹² The evidence was more than sufficient to support the conclusion that termination of both Phipps's and Nash's parental rights was in the children's best interests.¹³ Given Phipps and Nash's pattern of behavior over many years, it was reasonable for the trial court to conclude that the children were at risk of harm if placed with Phipps and Nash. They were entitled to permanence and stability.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ William C. Whitbeck
/s/ Donald S. Owens

¹² MCR 2.613(A).

¹³ *In re Trejo Minors*, 462 Mich at 356.